

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's approval of a
4 conditional use permit and site plan review for a dog and
5 cat boarding kennel in the EFU zone.

6 **MOTION TO INTERVENE**

7 William and Tina Beck (intervenors) move to intervene
8 on the side of respondent. There is no opposition to the
9 motion, and it is allowed.

10 **FACTS**

11 Intervenors applied to the county for conditional use
12 approval and site plan review for a dog and cat boarding
13 kennel on their 10.97 acre parcel, located in the county's
14 EFU zone. EFU-zoned parcels border the subject parcel to
15 the north and south. Property to the east is zoned Woodland
16 Resource and Rural Residential, and property to the west is
17 zoned EFU and Rural Residential.

18 Intervenors' proposed boarding kennel will accommodate
19 ten outdoor dogs (in addition to intervenors' two dogs), ten
20 small, indoor dogs and fifteen cats. The boarding facility
21 is proposed to include twelve boarding rooms and outdoor
22 runs for large dogs, and two indoor rooms for small dogs and
23 cats. All animals will be locked inside at night. In
24 addition, the entire facility will be soundproofed with
25 polyurethane foam insulation.

26 Intervenor Tina Beck is a trained and experienced

1 animal conditioner, trainer and handler. Based on her
2 expertise, she designed the proposed kennel with both
3 individual dog runs and a large, enclosed exercise yard to
4 allow for training and conditioning large dogs during
5 boarding. In explaining the proposed design, she stressed
6 the importance of exercise to large dogs during boarding,
7 both to maintain fitness and to reduce anxiety and resulting
8 aggressive behavior, including barking.

9 To further decrease potential for barking, the kennel
10 is designed with the outdoor dog runs at the rear of the
11 kennel in order to prevent dogs outside from seeing traffic
12 approaching the facility. The kennel is also designed with
13 a visual barrier between the individual outdoor dogs runs,
14 and between the outdoor exercise area and the dog runs, in
15 order to prevent dogs from seeing one another.

16 Petitioner owns a vacant, undeveloped EFU-zoned parcel
17 300 feet south of the proposed kennel. Prior to the hearing
18 on the proposed kennel, petitioner received a hearing notice
19 that described the proposal as for a dog and cat boarding
20 kennel, and included a site plan for the proposed kennel. A
21 "Request for Property Owner Comment" accompanied the notice.
22 Petitioner responded to the comment request by objecting in
23 writing that the proposed kennel would create excessive
24 noise and otherwise adversely affect the future development
25 of his property.

26 Following a public hearing, the county hearings officer

1 approved intervenor's application. This appeal followed.

2 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

3 Petitioner objects first that the use approved by the
4 hearings officer is different from the proposal described in
5 the hearing notice to such a degree that the notice did not
6 reasonably describe the hearings officer's final actions,
7 prejudicing petitioner's substantial rights. Petitioner
8 also objects that the use approved is not allowed as a
9 conditional use in the EFU zone.

10 In essence, petitioner argues that the county's notice,
11 as well as intervenors' request, referred to the proposal as
12 a boarding kennel, but that in its decision the hearings
13 officer relied on Tina Beck's expertise in dog training,
14 handling and conditioning. Consequently, petitioner
15 concludes that the approval was not for a boarding facility,
16 but for a boarding facility that includes dog training,
17 handling and conditioning. Petitioner complains that [n]o
18 mention was made of training, conditioning and handling of
19 dogs in the notice provided to petitioner." Petition for
20 Review 7. According to petitioner, dog training,
21 conditioning and handling facilities are not allowed in the
22 EFU zone.

23 The fact that Tina Beck has expertise in training,
24 conditioning and handling animals does not change the nature
25 of the application. Intervenors' application was for the
26 boarding kennel use described in the notice and specifically

1 illustrated on the map of the proposal that accompanied the
2 notice. The notice of the proposed use described the use
3 approved. The approved boarding kennel is allowed as a
4 conditional use in the EFU zone.¹

5 The first and second assignments of error are denied.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner contends the proposed use does not require a
8 rural setting, as required by Jackson County Land
9 Development Ordinance (LDO) 260.040(4), which states:

10 "The proposed use will either provide primarily
11 for the needs of rural residents and therefore
12 requires a rural setting in order to function
13 properly or the nature of the use requires a rural
14 setting * * * even though the use may not provide
15 primarily for the needs of rural residents."

16 The hearings officer determined that the specific
17 characteristics of the use intervenors propose requires a
18 rural setting, as follows:

19 "The rural atmosphere limits distractions to the
20 dogs, and is conducive to [Tina Beck's] goals as a
21 trainer, conditioner and handler. While dogs can
22 be housed indoors in relatively sound-proofed
23 facilities which do not require a rural setting,
24 the type of handling and training applicants
25 propose is best conducted in a rural area, away
26 from urban traffic, noises and relatively intense

¹Moreover, even if the approval had been different than that for which notice was given, petitioner has not established the difference prejudiced him. His objection is that the kennel would create excessive noise and adversely affect the future development of his property. He has not established how his objection would have been any different had the notice further specified that boarded dogs would receive training and conditioning in the designated exercise yard. Jackman V. City of Tillamook, 29 Or LUBA 391 (1995).

1 land uses." Record 9.

2 Based upon those findings, the hearings officer concluded:

3 "[A]pplicants have shown the nature of the
4 particular use they propose does require a rural
5 setting in order to function properly. The
6 Hearings Officer notes that this would not be his
7 finding were this merely an application for a
8 kennel facility where people board their dogs and
9 cats. What distinguishes this application is the
10 fact that applicant Tina Beck is a dog trainer,
11 conditioner and handler, and the particular use
12 she intends requires a rural - rather than an
13 urban - setting." Record 11-12.

14 Petitioner does not provide evidence that the use as
15 proposed does not require a rural setting. Rather,
16 according to petitioner, a kennel can be accommodated in an
17 urban setting, and therefore cannot be allowed in a rural
18 setting.

19 The fact that some kennels can be accommodated in an
20 urban setting does not compel the conclusion that all
21 kennels must be located only in urban settings.
22 Petitioner's argument would nullify LDO 218.040(14) which
23 specifically permits kennels in the EFU zone as conditional
24 uses.

25 Based upon the hearings officer's interpretation of the
26 LDO and his application of LDO 260.040 to the facts in this
27 case, he determined that the specific kennel intervenors
28 propose requires a rural setting. We find the hearings
29 officer's conclusion to be both reasonable and correct.
30 Gage v. City of Portland, 319 Or 308, 887 P2d 1187 (1994);
31 Watson v. Clackamas County, 129 Or App 428, 879 P2d 1309

1 (1994); McCoy v. Linn County, 90 Or App 271, 752 P2d 323
2 (1988).

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 Petitioner contends that because the hearings officer
6 relied on Tina Beck's expertise as a dog trainer,
7 conditioner and handler in evaluating why the proposed use
8 requires a rural location, the approved use cannot run with
9 the land, in violation of LDO 260.030(8).² Alternatively,
10 petitioner argues the decision must be remanded for
11 imposition of a condition that either conditions the
12 approved use to Tina Beck's personal operation of it; or
13 expressly requires the approved use to comply with the
14 county's land use regulations.

15 The hearings officer's reliance on Tina Beck's
16 expertise in evaluating the nature of the proposed use does
17 not preclude the use, as approved, from running with the
18 land. As intervenors responded:

19 "The fact that this kennel has an exercise yard

²LDO 260.030(8) states:

"Unless otherwise expressly provided in its terms or conditions, a Conditional Use Permit shall run with the land and the rights and responsibilities conferred by it shall vest in whoever owns or lawfully possesses or controls the land. However, unless otherwise provided in the terms of such a permit, the compliance with the obligations imposed by its conditions shall be the responsibility of all the owners and successive owners of the land, and any other person who conducts or permits thereon the use authorized by the permit."

1 recognized by the Hearings Officer, is simply a
2 feature that distinguishes this kennel from that
3 of merely a boarding kennel. The boarding kennel
4 and all of its distinguishing features can run
5 with the land in accordance with LDO 260.030(8).
6 Operator Tina Beck can be replaced with another
7 qualified individual [who] desires to operate this
8 facility including the exercise yard, to provide a
9 meaningful service to the public. Tina Beck is
10 not included in any description of the proposed
11 use in the Final Order, the staff report, or the
12 applicant's own application." Response Brief 11.

13 We agree. Nothing in the final order precludes this
14 approved use from running with the land, in accordance with
15 LDO 260.030(8). Although Tina Beck's particular expertise
16 was critical in how the proposed use was designed, the
17 approved use is not dependent upon Tina Beck for its
18 operation. The county was not required to condition
19 approval of the use on Tina Beck's operation of it. Nor was
20 the county required to expressly condition approval on
21 compliance with its LDO. See Wilson Park Neighborhood
22 Association v. City of Portland, 27 Or LUBA 106, 124 (1994).

23 The fourth assignment of error is denied.

24 **FIFTH ASSIGNMENT OF ERROR**

25 Petitioner contends the hearings officer failed to
26 consider evidence presented by petitioner regarding the
27 impact of the proposed kennel on farm use and that,
28 therefore, the decision must be remanded to determine

1 whether the application satisfies LDO 218.100.³
2 Specifically, petitioner challenges the hearings officer's
3 finding that:

4 "No owner/operators of farm or forest-zoned land
5 in the vicinity objected to the proposal on the
6 basis that it would interfere with or increase the
7 cost of accepted farm or forest practices, or that
8 it would decrease farm or forest income." Record
9 8-9.

10 Petitioner argues that he objected to the proposal on that
11 basis and, consequently, the hearings officer's contrary
12 conclusion is erroneous.

13 Petitioner's participation in the local process
14 consisted of a seven-point written response to the county's
15 "Request for Property Owner Comment." That response
16 addresses increased noise from the kennel, decrease in the
17 value of his property for future home sites, and "undue
18 restrictions on future farm use such as the location for
19 future home sites and housing for farm animals." Record 61-
20 62. There is nothing in petitioner's written statement to

³LDO 218.100(1) lists the standards for all conditional uses, as follows:

"(A) The use will not force a significant change in accepted farm or forest practices on surrounding lands devoted to farm or forest use; and

"(B) The use will not significantly increase the cost of accepted farm or forest practices on lands devoted to farm or forest use.

"(C) The use will not cause a decrease in income or a reduction in acreage available for any existing farm use on adjacent lands."

1 indicate that petitioner was objecting on the basis that the
2 proposed kennel would "interfere with or increase the cost
3 of accepted farm or forest practices, or that it would
4 decrease farm or forest income." Record 9.

5 Petitioner has not established that, based upon the
6 record before him, the hearings officer's factual conclusion
7 was erroneous.

8 The fifth assignment of error is denied.

9 **SIXTH ASSIGNMENT OF ERROR**

10 Petitioner contends the county's decision lacks
11 substantial evidence to support the conclusion that the
12 proposed use will have a minimal adverse impact on the
13 surrounding area, as required by LDO 260.040. According to
14 petitioner, the evidence in the record compels the
15 conclusion that the projected noise from the kennel will
16 create an adverse impact on the livability and values of the
17 surrounding area.

18 Substantial evidence is evidence a reasonable person
19 would rely on in reaching a decision. City of Portland v.
20 Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475
21 (1984); Bay v. State Board of Education, 233 Or 601, 605,
22 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA
23 118, aff'd 108 Or App 339 (1991). Where a reasonable person
24 could reach the decision made by the local government, in
25 view of all the evidence in the record, we defer to the
26 local government's choice between conflicting evidence.

1 Younger v. City of Portland, 305 Or 356, 360, 752 P2d 262
2 (1988); Angel v. City of Portland, 22 Or LUBA 649, 659,
3 aff'd 113 Or App 169 (1992); Wissusik v. Yamhill County, 20
4 Or LUBA 246, 260 (1990); Douglas v. Multnomah County, 18
5 Or LUBA 607, 617 (1990).

6 The evidence in this case is conflicting: petitioner
7 projects that the kennel will create excessive noise.
8 Intervenors presented evidence that the proposed kennel is
9 designed, both physically and operationally, to minimize the
10 potential for barking and other aggressive behavior. A
11 reasonable person could reach the conclusion of the hearings
12 officer, and we defer to it.

13 The sixth assignment of error is denied.

14 The county's decision is affirmed.